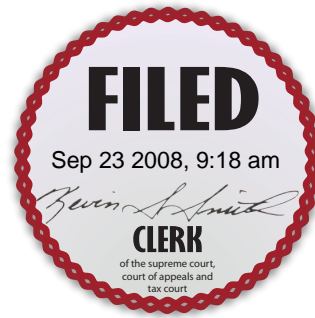


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ANNA E. ONAITIS
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES JOHNSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0706-CR-314

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Commissioner
Cause No. 49G05-0011-CF-194786

September 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Charles Johnson appeals the trial court's order that he serve three years of his previously suspended sentence after his admission of multiple probation violations.

We affirm.

ISSUE

Whether the trial court's order is an abuse of discretion because the term that Johnson was ordered to serve for violating probation failed to take into account the period of Johnson's incarceration in a federal facility as a result of violation of his federal parole.

FACTS

On November 1, 2000, the State charged Johnson with robbery, a class B felony; unlawful possession of a firearm by a serious violent felon, a class B felony; resisting law enforcement, a class D felony; and carrying a handgun without a license, a class A misdemeanor. On September 30, 2002, the trial court accepted Johnson's plea of guilty to the offense of unlawful possession of a firearm by a serious violent felon; entered judgment of conviction; and imposed a ten-year sentence – suspending four years thereof to probation.¹

On January 3, 2006, a notice of probation violation was filed, alleging that Johnson had failed to report for probation. On January 31, 2006, a second notice of probation violation was filed, alleging that not only had Johnson failed to report for probation but he had also been arrested and criminal charges were filed against him on

¹ The trial court also granted the State's motion to dismiss the remaining three charges.

January 9, 2006. At a fact-finding hearing on March 22, 2006, Johnson admitted that he had failed to report to probation; the allegation of criminal charges was withdrawn; and Johnson was ordered to continue probation with strict compliance.

On December 27, 2006, another notice of probation violation was filed, alleging that Johnson failed to comply with monetary obligations; failed to comply with community service obligations; submitted a diluted urine sample; and failed to maintain full-time verifiable employment. At a hearing on February 7, 2007, Johnson admitted the allegations. and he was ordered to continue probation with strict compliance.

On April 4, 2007, yet another notice of probation violation was filed, repeating the December 27, 2006, allegations and adding “five more” alleged violations – five positive drug screens. (Tr. 9, App. 68). The trial court was advised that Johnson’s continuing failure to comply with probation led to his being “offered three years DOC.” (Tr. 9). Johnson “accept[ed] the offer” and “admit[ted]” the alleged violations. *Id.* The trial court then found that Johnson was “in violation,” revoked his probation, and ordered him to serve three years executed. (Tr. 11).

Subsequently, Johnson filed motions with the trial court seeking modification of the three-year term he was ordered to serve. Therewith, Johnson asserted by affidavit that he had completed serving his initial executed time for the firearm offense on October 28, 2003, at which time he was released to and then “remained in federal custody for a parole violation until August 19, 2005.” (Tr. 146). Johnson reminded the trial court that the initial sentencing order had suspended four years, or 1,860 days to probation. Therefore, according to Johnson, he should be credited for the 660 days of his intervening

federal incarceration and could only be ordered to serve an additional “800 days of previously-suspended time” – not three years, or 1,095 days, as ordered. (App. 142). The trial court denied Johnson’s motions.

DECISION

Our Supreme Court has recently summarized our review of a challenge to the trial court’s sentencing order upon the defendant’s violation of his probation, as well as the basis for that review standard, as follows:

Probation is a matter of grace left to trial court’s discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants. Accordingly, a trial court’s sentencing decisions for probation violations are reviewable using the abuse of discretion standard. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007) (internal citations omitted). Further, after the trial court finds that a person has committed a violation, it may “order execution of all or part of the sentence that was suspended at the time of the initial sentencing.” Ind. Code § 35-38-2-3(g)(3).

Johnson argues that the trial court abused its discretion when it failed to give him “credit towards his suspended Indiana sentence for the time he spent in” federal incarceration. Johnson’s Br. at 6. He contends that he is entitled to such credit “because

his September 30, 2002, conviction in Indiana violated his federal parole,”² and, therefore, his federal incarceration was “related to and resulted from his Indiana conviction.” *Id.* We cannot agree.

Johnson’s argument relies solely on *Bertucci v. State*, 528 N.E.2d 90 (Ind. Ct. App. 1988). *Bertucci* dealt with whether Bertucci was entitled to credit time under Indiana Code section 35-50-6-3, but Johnson expressly “does not assert that he [Johnson] should receive Class I credit time for the time he was incarcerated in the Federal Bureau of Prisons.” Johnson’s Br. at 7, n.1. Nevertheless, Johnson’s argument of his entitlement to credit for the time he was incarcerated in a federal facility appears premised upon application of Indiana Code section 35-50-6-3.

As our Supreme Court explained in *J.D. v. State*, 853 N.E.2d 945, 947 (Ind. 2006), “Indiana Code section 35-50-6-3” provides for “additional credit a prisoner receives for good behavior and educational attainment.” *J.D.* declared that this statutory provision is inapplicable to a defendant seeking the application of credit “for time actually served.”³ Rather, the statute provides “rights to good time credit” and “simply does not speak to the

² We note that the record fails to support Johnson’s assertion that he was incarcerated in a federal facility from October 28, 2003 until August 19, 2005, “because his September 30, 2002, conviction in Indiana violated his federal parole.” Johnson’s Br. at 6. Johnson submitted certified “Federal Bureau of Prisons’ records” as to his custody thereby. (App. 149). These appear to show that he was in federal custody during the period he states. However, he submitted no evidence to establish that this federal incarceration resulted from his having violated his federal parole by having committed the firearm offense with which he was charged and of which he was convicted. The appellant bears the burden of presenting a record to sustain his argument. *Purdy v. State*, 708 N.E.2d 20, 23 (Ind. Ct. App. 1999).

³ Indeed, it seems unnecessary that there would be a statute providing that a prisoner receive credit “for time actually served,” *id.*, inasmuch as the failure to apply such a credit would constitute an illegal increase in the judicially ordered sentence.

right for credit for time served.” *Id.* Because Johnson is not seeking good time credit, *Bertucci* is inapposite here.

Repeatedly, Johnson was provided notice that he had committed violations of his probation terms. More than once he was allowed to continue on probation and ordered to strict compliance. However, Johnson continued to fail to comply. Johnson admitted to the trial court that he had committed nine violations of his probation terms, and he expressed his acceptance of the offer that he serve three years. We find no abuse of discretion in the trial court’s order that Johnson serve three years of the initially ordered four-year suspended sentence for having violated probation.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.